IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN CRYSTAL SUGAR COMPANY	)	**FMCS CASE NO. 07-0116**
	)	
"EMPLOYER"	)	
	)	**DECISION AND AWARD**
And	)	
	)	
BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS AFL-CIO, CLC LOCAL 372 G	)	**RICHARD R. ANDERSON ARBITRATOR**
	)	
	)	
"UNION"	)	**JUNE 2, 2007**
	)	

JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on April 13, 2007 in Moorhead, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced by both parties and received into the record. The hearing closed on April 13, 2007. Briefs were simultaneously mailed on May 18, 2007 and received on May 21, 2007 at which time the record was closed and the matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that is currently effective from August 1, 2004 through July 31, 2011 [Joint Exhibit No. 1]. The relevant language in Article IX of the Agreement (Grievance And Arbitration) provides for the filing, processing and arbitration of a grievance including the authority of the arbitrator. The parties stipulated that this matter

does not involve any procedural issues concerning grievance timeliness[1]; and that it is properly before the undersigned arbitrator for a final and binding decision.

APPEARANCES

For the Union:

Daniel E. Phillips, Attorney
Gayln Olson, President Local 372G and Hillsboro employee
Tim Miller, Vice- President Local 372G and Hillsboro employee
Terry Holm, Former President Local 372G and Hillsboro employee

For the Employer:

James M. Dawson, Attorney
Dave Gravalin, Employee Relations Manager
Lloyd Kennedy, Hillsboro Factory Manager
Jenny Kjos, Moorhead Production Supervisor
Randy Axtman, Hillsboro Production Superintendent
Donna Seltveit, Director of Human Resources

THE ISSUE

The parties did not stipulate to the issue. The Union defines the issue as, "Did the Employer violate the collective bargaining agreement when it laid off campaign employees prior to the extract campaign in April 2006, and if so, what is the appropriate remedy? The Employer defines the issue as, "Does Article 2.3 require the Employer to layoff all extra campaign workers or none of them?"

BACKGROUND AND FACTS

The Employer is an agricultural cooperative engaged in the processing of sugar beets into refined sugar and related by-products at five facilities located in the Red River

[1] The Employer indicated that it might raise a procedural issue alleging that the Union changed the scope of the grievance during grievance processing.

Valley of Western Minnesota and Eastern North Dakota including the facility involved herein located in Hillsboro, North Dakota. The other four facilities are located in Moorhead, Crookston and East Grand Forks, Minnesota and Drayton, North Dakota. The parties have a long history of collective bargaining dating back to the 1940's. The International Union through various Locals represents approximately 950 to 1,400 production and maintenance employees, depending upon peak production periods, at the aforementioned facilities.[2] While there is one Master Agreement covering all the facilities, the various Locals are responsible for contract administration including grievance processing at their respective facilities. This practice was true in 1990 and in each year since, the relevant period herein. Local 372G, hereinafter the Union, represents the employees at the Hillsboro facility.

The Employer employs different labor forces. It has regular full-time employees, referred to in the Agreement as "year-round employees" who work both during the beet campaign and the inter-campaign seasons. It also has part time or seasonal employees, referred to in the Agreement as "campaign employees" who normally work only during the beet campaign period. Finally, it has harvest employees that are agricultural employees. Year-round employees receive health and dental insurance, 401k and vacation benefits, and also receive higher pay. The yearly cost of these benefits is estimated to be approximately $25,000 per employee. Campaign employees are considered part-time or seasonal and are not eligible for any the aforementioned benefits. Likewise harvest employees receive no benefits.

[2] Initially there were separate Locals at each facility. Since 1995, separate Locals remained at Hillsboro and Crookston while the Locals in Moorhead, East Grand Forks and Drayton merged into a single Local.

In addition, Article 2.4 has a provision whereby campaign employees may become year-round employees. This usually occurs if a campaign employee is hired as a year-round employee or works "75% of the scheduled days in any twelve-month period" or "continues on after beet, syrup or desugarization campaign, or is laid off for a period of less than 31 days at the end of such campaigns".

The Employer operates its facilities on a year-round basis with its operation broken down into different periods or seasons. The first season or the "beet campaign " is the period that begins in early fall when sugar beets are harvested, sliced and then processed into raw sugar. There are different sides or "ends" to the factory operation during the beet campaign. The "beet end" of the production process consists of the initial processing of beets including slicing the beets before they get to the "sugar end" where the beets are ultimately processed into raw sugar. There are also "pulp drying" and "pellet loading and packaging" areas that continue to operate during the summer unlike the "beet end" process.

Once the raw sugar processing is completed, usually in mid-April to early May, the "inter-campaign " begins. The inter-campaign season consists primarily of the maintenance of equipment and plant cleanup in preparation for the fall or beet campaign. Both year-round and campaign employees work during the beet campaign. Year-round employees who have been working during the beet campaign continue to work during the inter-campaign season, which begins, as stated above, when the beet campaign ends and finishes when the beet campaign season begins in late August or early September. Campaign employees are normally laid off when the beet campaign ends and do not work during the inter-campaign.

In two of the facilities (Hillsboro and East Grand Forks), there is also a period or season in addition to the inter-campaign season after the beet campaign season ends. This is referred to as the "extract campaign". It is also referred to as the "syrup" or "juice" or "desugarization" campaign. During the beet campaign, a by-product of the sugar is created in the form of molasses or a liquid extract. This by-product is then shipped to either Hillsboro or East Grand Forks where it is stored until the beet campaign ends and the extract campaign begins. The initial extract campaign period usually lasts approximately six to seven weeks. When this initial extract campaign ends, the Hillsboro and East Grand Forks plants usually take a month off for repair and maintenance before a second extract campaign begins in late July or early August and continues until the fall beet campaign begins.

There are a number of areas or ends that function during the extract campaign. The "sugar end" function consists of processing the liquid sugar into sugar. There is also the bulk loading function wherein large quantities of sugar are placed in huge containers for shipment. Molasses Desugarization (MDS) where previously stored syrup is reduced into sugar is the third area that functions during the extract campaign.

At both Hillsboro and East Grand Forks year-round employees do not automatically move into inter-campaign positions when the campaign ends. Each spring, the Employer would notify the Union and discuss the holdover positions needed for the extract campaign and the layoff/holdover process to be followed. Those employees who are working in sugar end classifications or positions needed for extract campaign production, are retained in those positions, rather than moving directly to the inter-campaign maintenance and clean up positions. Once the extract campaign is over,

they then make this transition. Certain campaign employees who would normally be laid off may also be retained during the extract campaign if they were in sugar end classifications needed for the extract campaign. These campaign employees were traditionally retained even though more senior campaign employees were laid off.

In the late 1980's the Employer began discussions with the International Union about constructing a MDS facility in East Grand Forks and ultimately another in Hillsboro. After the MDS facility was completed in East Grand Forks, the initial extract campaign began in late1992 or early 1993 and continues to date. The parties initially negotiated Article 2.3 during the 1990 negotiations. The parties agreed that campaign workers who were working in sugar end job classifications needed for the extract campaign would be retained irrespective of their campaign seniority.

According to the testimony of Employee Relations Manager Dave Gravalin, campaign employees, who were working in sugar end job classifications, were initially used during the East Grand Forks extract campaign to fill certain jobs needed for the extract campaign; but were phased out when there were sufficient year-round employees to staff the inter-campaign positions and also fill available extract campaign positions. This transition period ended in 2001 when no campaign employees were retained for the extract campaign, a practice, which continues to date at East Grand Forks. Neither the Local Union nor the International Union ever filed a grievance when campaign employees were being phased out beginning in 1993 or when the phase out was completed at the beginning of the 2001 extract campaign when no campaign employees were used.

The Hillsboro MDS facility came on line in 2000. Campaign employees were initially used to fill certain extract campaign positions that were in sugar end positions needed for the extract campaign. As with the East Grand Forks campaign employees who were retained for the extract campaign, the retention of campaign employees to be used during the campaign was not by seniority; but rather by position classification needed for the extract campaign.

During the spring 2005 discussions concerning the number of positions needed for the extract campaign, the Employer notified the Union that it had initially planned on retaining none of the campaign employees, however, it did not have enough employees to replace the positions; however, it would begin replacing campaign employees in 2006 if it had sufficient year-round employees.. In the spring of 2006, the Employer notified the Union during extract position discussions that it would begin phasing out campaign employees beginning in 2006. Later, the Employer used six year-round employees to fill positions previously occupied by campaign employees for the spring 2006 extract campaign. Ten positions were ultimately needed; hence the Employer retained the four most senior campaign employees who were working in sugar end to fill the other extract positions needed for the campaign.

When the Union learned of this action it filed a grievance through Tim Miller, Vice-President of Local 372G (Hillsboro) on May 8, 2006 [Joint Exhibit No. 2 p. 1]. The grievance alleges:

> *The Company has unilaterally and knowingly violated the long term intent of the 'all in or all out' aspect of Article 2.3. Due to this willful and flagrant violation of a well documented past practice, all employees affected should be made whole in every respect. This includes and is not limited to wages and seniority and any other benefits for the improperly laid off employees, and shift differential and any other*

benefits to the employees that have been wrongly assigned to fill in for the juice campaign employees that were displaced by improper lay-off.

On May 16, 2006 the Employer issued its answer to the Union [Joint Exhibit No. 2 p.2]. The relevant part of the grievance states:

> *The Company did not violate any provisions of the Master Agreement when it administered Section 2.3 of the Master Agreement. When it was determined that all employees in the Juice Campaign were needed according to staffing levels, all affected classifications were utilized. With the current staffing of a significant number of new additional year-round employees, less campaign employees were retained based upon seniority in the appropriate classifications. This doesn't constitute a documented past practice that the language was an "all in or all out" definition. Grievance denied.*

On May 24, 2006, the Union moved the grievance to Step 3. [Joint Exhibit No. 2 p.2]. A Step 3 meeting was held on May 31, 2006 the results, which were issued by memorandum from Hillsboro Factory Manager Lloyd Kennedy that same day. The memorandum stated:

> *The Company has no knowledge of an agreement and Local 372G has not provided documentation that an agreement ever existed. The company administered Article 2.3 as it is stated in the current Master Agreement. Grievance denied.*

Thereafter, the Union filed for arbitration. The undersigned was notified by letter from the Union dated January 29, 2007 that I had been selected to arbitrate this matter.

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNION

1.7 Management rights: *The Company shall have full power and authority to determine all matters in connection with plant operations, including the right to introduce labor-saving devices or new processes which are not inimical to the safety and health of employees. When such devices are installed, or new processes are attempted, the company will meet with the Local Union Committee to discuss such changes. It is further agreed that six months later the Company and Local Union will meet to re-assess such changes if requested by the Local*

Union. The Company shall have the right to close any plant when they genuinely believe it to be in the best interests of the Company.

ARTICLE II - DEFINITIONS

2.1 Inter-Campaign: *Inter-campaign shall mean that portion of the year, which is not included in the definitions of campaigns below.*

2.2 Beet Campaign: *Beet Campaign period means the period starting with the first twenty-four (24) hour period during which beets are sliced. The beet campaign period will end 5 days (7 days at East Grand Forks and Hillsboro) after the last beets are sliced. At the Mason City and Chaska plants no part of the year shall be considered as campaign.*

2.3 Syrup and Desugarization Campaign: *Syrup and/or Desugarization Campaign shall be the period starting with the beginning of the first twenty-four (24) hour period during which stored syrup is processed and ending four (4) days after the last stored syrup has been processed into dried sugar. During the syrup and/or desugarization campaign all employees (including the Sugar Warehouse Foremen and Assistant Warehouse Foremen, when warehouse crew is used for the production of sugar), whose jobs are directly related to such production shall be considered as working in the campaign, and all employees who are not assigned to syrup and/or desugarization campaign shall be considered as working on the inter-campaign schedule.*

2.4 Year-Round Employees*: A year-round employee shall be any employee who:*

I. *is hired as year-round;*

2*. works 75 percent of the scheduled work days in any twelve (12) month period; *(Compensible time lost by an employee need not be made up to qualify as year-round). Employees who qualify as year-round may refuse year-round seniority if they so desire, at any time they qualify for year-round.)*

3*. continues on after beet, syrup or desugarization campaign, or is laid off for a period of less than 31 days at the end of such campaign.*

All employees, except Office and Packaging, qualifying for year-round status under the 75% provision as defined above, must possess a minimum skill level of Mechanics Helper to be considered as a year-round employee. However, if an Office or Packaging Employee bids on a position outside of these areas, such employees will be required to have a minimum skill level of Mechanic Helper

It is further recognized that campaign employees may be retained or recalled for up to 2 weeks at the end of their assigned campaign to assist with plant cleanup and shall not become year-round employees. It is further recognized that the size of the year-round crew at each factory may vary from one contract year to another; and, in

this connection, it is agreed that any increase in or reduction of the size of the year-round crew at any factory during any contract year shall be based upon seniority and the ability and physical qualifications of the affected employees to perform the inter-campaign work to which they are assigned in satisfactory manner.

5.2 Plant Seniority: *The employee's plant seniority will commence the day he becomes a year-round employee. (Refer to 5.5)*

5.3 Campaign Seniority: *The employee's campaign seniority will commence the day he starts to work as a campaign employee. Campaign seniority shall be calculated by taking the number of days between the date the employee is hired or recalled and the date the employee is laid off. Campaign employees shall accumulate seniority during an approved medical leave of absence, but only for the time that the employee would have normally worked.*

5.10 Seniority Lists: *There shall be three seniority lists in each factory; one showing the seniority of year-round employees, one showing the seniority of campaign employees and the other showing the seniority of the factory harvest employees that do not have a factory title and have not successfully completed the thirty (30) day trial period*

Article IX– Grievance and Arbitration

9.4. Definition Of A Grievance: *A grievance, for the purpose of this Agreement, is any controversy, complaint, misunderstanding or dispute arising as to the meaning, or application or observance of any of the provisions of this Agreement (other than the provisions of the Article X (No strikes or Lockout), which would be handled immediately as conditions require).*

9.5. Steps In Grievance Procedure: *In the event of a grievance, any employee affected who wishes to have the matter determined with respect to him shall file a grievance in writing with a steward, on a form approved by the Local Union and the Company and to be provided by the Local Union, within ten (10) working days of the date of the grievance. The filed grievance claim shall describe the nature of the grievance and shall establish the date of the grievance and shall be signed by the aggrieved employee.*

9.6. Arbitration: *If the parties hereto are unable to satisfactorily settle a grievance in accordance with the foregoing procedure and if such grievance arises and is presented during the term of this Agreement and concerns the interpretation or application of any of the terms or provisions of this Agreement, such grievance may be submitted by either party to arbitration…*

9.7. Arbitration: *…The arbitrator shall have authority to act only with respect to grievances which arise and are presented during the term of the provisions of this*

Agreement and which relate to the interpretation and application of the provisions of this Agreement and his decision shall be final and binding on all parties….

POSITION OF THE UNION

The Union's position is that the employer violated the Agreement when it laid off certain campaign employees instead of retaining those employees during the extract campaign in April 2006. The Union argues that the Employer is picking and choosing employees to be retained during the extract campaign in violation of the Agreement. The Agreement requires the Employer to keep all the campaign employees directly related to the extract campaign or go through a layoff process. In this regard, the Employer made up a new invalid sub-seniority list of only employees holding sugar end job classifications and held over campaign employees off of that list by seniority. Article 5.10 of the Agreement clearly outlines that there are only three seniority lists in each factory—(1) year-round employees, (2) campaign employees and (3) harvest employees. There is no sugar end campaign employees' seniority list.

The Union further argues that at the onset of the proposed extract campaign in 1990, it only made sense that the parties would have discussed how to staff the campaign. The Employer would most certainly want the most qualified employees to be in those positions; and the employees holding the jobs in the sugar end of the beet campaign would most likely be the most qualified for the extract campaign. The Agreement, however, would require that all campaign workers needed to fill those positions would be based upon seniority, assuming they had the necessary minimal qualifications. Former Local President Terry Holm testified that in 1990 the parties agreed in Article 2.3 that a strict holdover and layoff would not be required; however, in exchange for this concession, the employees performing the jobs at the time the extract

campaign began would continue to hold the jobs rather than requiring the Employer to go through a strict seniority holdover layoff procedure. Holm testified that this is what he termed as the "all in all out" agreement. Thus, either all of the campaign employees performing jobs prior to the start of the extract campaign would continue to hold those jobs (all in) or a strict seniority holdover/layoff procedure would occur (all out). This is the procedure that the Employer followed from the time the MDS facility became operative at Hillsboro in 2000 until the Employer changed the procedure in the spring of 2006.

The Union also argues that there were never any discussions in 1990 or any time thereafter that a separate seniority list of sugar end employees would be constructed and the holdover/layoff procedure would be done pursuant to that seniority list. It is significant that ever since the Employer proposed selecting the holdover employees for the extract campaign out of seniority and in an improper fashion, no grievance was ever filed over this procedure. This is because the parties agreed that all campaign employees holding jobs needed for the extract campaign would be retained regardless of their campaign seniority.

The only grievance ever filed was in 1991 wherein an employee thought that her position should have continued during the extract campaign [Union Exhibit No. 2]. What is significant about this grievance is the quoted language of the grievant, "The people performing the jobs during campaign will stay and do the jobs for juice campaign". This precisely the language former President Holm termed the "all in or all out" agreement when the language of Article 2.3 was negotiated into the Agreement. The Employer did

not deny the statement by that grievant. If the practice as outlined in the grievance was incorrect, surely the Employer would have said so.

The Union further argues that it is obvious that the past practice of the Employer holding over campaign employees whose positions were in the sugar end production and needed for the extract campaign constitutes a past practice that became a part of the Agreement. The need for a separate agreement that required the Employer to follow an "all in all out" procedure is irrelevant since that is how the Employer has filled all the positions from Article 2.3 since 1990.

POSITION OF THE EMPLOYER

The Employer's position is that the Union has not sustained its burden of proof that the Employer violated Article 2.3 of the Agreement, which is the only issue submitted to arbitration. The Employer argues that it proposed Article 2.3 during the 1990 negotiations and it came into the Agreement without any change. Former President Holm testified that the purpose of Article 2.3 made clear by the Employer was to allow junior campaign employees to be retained at the end of the beet campaign and move into the extract campaign positions if that employee held a job during the beet campaign that would be directly related to the extract campaign. Prior to this negotiation there was a type of extract campaign that involved a product different than what was ultimately produced at the new MDS facilities where selection of campaign employees was done strictly by seniority.

Further, Holm testified that the Union's primary concern during negotiations was that the use of Article 2.3 would allow employees to "slide" into inter-campaign maintenance positions and thus become year-round employees without using overall seniority. As a

result the Employer, upon request of the Union, produced a list of jobs likely to be considered to be part of the extract campaign.

The Employer further argues that the Union never claimed that the "all in or all out" procedure was ever discussed during the 1990 negotiations. Holm never claimed that the Employer and the Union agreed to the "all in or all out" procedure. In fact, the Union's assertion of this procedure was contradicted by a number of witnesses during the hearing. Lloyd Kennedy, the Manager of the Hillsboro facility since 2004 and formerly the co-Manager since 1999, testified that the first time he heard of this alleged procedure was when the grievance was filed in this matter. Dave Gravalin, Manager of Employee Relations since 1997 and a supervisor since 1980, testified similarly.

Further Jenny Kjos, a long term employee who is currently the Packaging Supervisor at the Moorhead facility and served a number of years as a Union officer including the Local Union President at the Moorhead facility and a member of the International Union negotiations team in 1990 where she was the Recording Secretary, testified that she had never heard of the "all in or all out" procedure. She testified that it was never a subject of the 1990 negotiations, and that the first time she heard the Union assert this claim was the filing of the instant grievance. She further testified that if it had been part of the 1990 negotiations, her notes would have reflected this.

It is also significant that the Union could not produce a single document encompassing the "all in or all out" procedure. Finally, in the 1990 negotiations there was never any discussion of an implied restriction that would require the Employer to retain all campaign employees who held jobs related to the extract campaign or, if not all were retained, then the Employer had to use the campaign employee seniority list

and retain the most senior employees on that list even if they held jobs during the beet campaign that were not directly related to the extract campaign.

The Employer also argues that it is undisputed that Article 2.3 allows for a layoff out of seniority, something that the Employer with the consent of the Union has done since the inception of the language in 1990. The sole basis for the Union's grievance is that since 2000, when the Hillsboro MDS facility came on line, until 2006, the Employer has always kept all campaign employees whose jobs were directly related to the extract campaign. There is nothing in the Employer's decision between 2000 and 2006 to keep all campaign employees with directly related jobs for the extract campaign that rises to the level of a past practice. Campaign employees were used because of a lack of year-round employees to fill needed jobs otherwise the extract campaign would have come to a halt. The use of campaign employees during the extract campaign from 2000 to 2005 is not a surrender of its right to use less than all of the campaign employees; but rather, represents a mere happenstance based on the lack of availability of year-round employees. The Employer's decision in this regard is clearly within the exercise of managerial discretion, which is fully consistent with the management rights clause in the Agreement that gives to the Employer the "… full power and authority to determine all matters in connection with plant operations …".

The Employer argues further that there is nothing in Article 2.3 requiring an "all in or all out" procedure alleged by the Union. The language in Article 2.3 is clear and unambiguous — the Employer is entitled to retain beet campaign employees so long as the beet campaign employees' job is directly related to the extract campaign. Seniority of the campaign employees is not a factor and more senior campaign employees have

been laid off without objection from the Union in East Grand Forks since 1993 and at Hillsboro since 2000. In fact, Manager of Employee Relation Gravalin testified that East Grand Forks Local President Mel Morris advised him that the Employer was entitled to keep whatever number of campaign workers it needed so long as their jobs were "directly related" without any obligation to keep them all. Additionally, former Local President Holm testified that the beet factory operated by a different employer, Southern Minnesota Sugar Cooperative in Renville, Minnesota, whose employees are represented by the same International Union, engaged in the same process regarding the extract campaign that occurs at East Grand Forks and Hillsboro.

To adopt the Union's theory in this matter the arbitrator would have to rewrite the second sentence of Article 2.3 to essentially read as follows:

> *During the syrup and/or desugarization campaign all employees (including the sugar warehouse foreman and assistant warehouse foreman, when warehouse crew is used for the production of sugar), whose jobs are directly related to such production shall be considered as working in the campaign, and all employees who are not assigned to syrup and/or desugarization campaign shall be considered as working in the inter-campaign schedule except, however, if the Company does not retain all of the campaign employees whose jobs are directly related to the extract campaign it must then go to the campaign seniority list for that factory and retain only the most senior campaign workers in such number that it needs without regard to whether campaign workers beet campaign job was directly related to the extract campaign.* [Emphasis added]

Clearly if the parties intended that result they would have, as noted by former Union Recording Secretary Kjos, written that language into the Agreement. As stated earlier, to adopt the Union's theory would be an act of the arbitrator to rewrite this Article of the Agreement, not merely render an interpretation of it, which action would clearly be a decision that does not draw its essence from the Agreement.

The Employer further argues that there is no binding past practice that would support the Union's "all in or all out" theory. Article 2.3 is clearly unambiguous. It clearly provides that campaign employees may be retained out of seniority so long as the job they held is directly related to the extract campaign. Assuming arguendo that Article 2.3 is ambiguous, there is no enforceable past practice, which mandates the "all in or all out" theory advanced by the Union. There is no mutuality of agreement or understanding in such practice, which is an essential in finding that both parties intended a particular result to have ongoing legal significance. Rather, it is the Employer's decision in the exercise of its managerial authority to conduct business and to keep the plant operating using one method of staffing over another.

It is clear most arbitrators are extremely hesitant to allow an unwritten past practice or method of doing things to restrict a company from exercising traditional and recognized functions of management. The parties have stated clearly and unequivocally in Article 1.7 of the Management Rights clause that the Employer shall "…have full power and authority to determine all matters in connection with its operations… ." The Employer's decision to use all campaign workers in the extract campaign was out of necessity. There were not enough year-round employees to keep the extract campaign running.

Finally, the Employer argues that the Employer has complied with Article 2.3 when it laid off six campaign workers in April 2006. At the completion of the beet campaign there were a total of ten campaign workers who performed jobs directly related to the extract campaign. Of those ten, the Employer laid off six and retained the four most senior. In 2006, as in previous years, the parties met to identify jobs that would be

involved in the extract campaign. It is that list that was used in determining what beet campaign jobs held by campaign employees are directly related to the extract campaign. Also, as in past years, a review was undertaken to determine how many year-round employees from areas outside of the extract campaign were available to be used to perform extract jobs as opposed to conducting maintenance and repairs. In 2006, only four of the ten campaign employees were needed to fill out extract jobs and they were retained by seniority for the extract campaign.

The Union's "all in or all out" position would require the Employer to retain more senior campaign employees who did not hold jobs directly related to the extract campaign, which former Local President Holm admitted on cross-examination. Also, during the meeting with current Local President Gayln Olson to discuss the extract positions needed for the 2006 extract campaign in Early April 2006, Hillsboro Plant Manage Kennedy informed Olson that he would not be needing all the campaign employees and that the Employer would retain the most senior campaign employees it needed. Olson did not object and it was not until Holm became involved that the grievance was filed.

OPINION

The parties could not agree on the issue. It is clear from the evidence that the issue is whether the Employer violated Article 2.3 of the Agreement when it laid off certain campaign employees whose jobs were directly related to the extract campaign and replaced them with year-round employees, and, if not, what is an appropriate remedy.

The Employer is correct that the Union bears the burden of proof in this contract interpretation dispute. The Employer is also correct that if the contract language in

dispute is clear and unambiguous there is no need to consider any extrinsic evidence including the past practice argument of the Union. The well-established standards for contract interpretation are set forth in Elkouri & Elkouri, How Arbitration Works, 5th Ed. pgs. 470-515 (1997). Elkouri states, *"There is no need for interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will normally be applied by arbitrators"*.[3] Thus, if the language is clear and unambiguous, the undersigned need not consider extrinsic evidence to interpret the Agreement.

The language may not completely preclude me from going outside the literal language of the Agreement and considering past practice. There are, however, limitations to the role that past practice plays in contract interpretation. It is common for arbitrators to consider past practice along with bargaining history where the contract provision in dispute is "unclear and ambiguous". [4] The Courts have also sanctioned the arbitrator's reliance on past practice to interpret "ambiguous" contract provisions.[5]

The language in Article 2.3 clearly and precisely states in the first part of the second sentence[6], "*During the syrup and/or desugarization campaign all employees (including the Sugar Warehouse Foremen and Assistant Warehouse Foremen, when warehouse crew is used for the production of sugar), whose jobs are directly related to such production shall be considered as working in the campaign, ….".* Thus, it is clear that employees including year-round and campaign employees whose jobs are directly

[3] Id. 470.
[4] Id., at 472, 630, and 648-651
[5] Fairview Southdale Hospital v. Minnesota Nurses Association, 943 F.2d 1809 (1991)
[6] The first sentence of this Article is not relevant to this proceeding.

related to the extract production can be retained for the extract campaign, rather than be subject to layoff as the campaign employees normally are at the conclusion of the beet campaign. It is also clear that they can be retained even if they were not the most senior campaign employees during the beet campaign. This is because less senior campaign employees may have jobs directly related to the extract production while more senior campaign workers may not causing them to be laid off when the inter-campaign season starts. The parties have consistently applied this clear and unambiguous interpretation of the language since the 1993 opening of the MDS facility in East Grand Forks and the 2000 opening of the MDS facility in Hillsboro.

The second part of sentence two, which states, *"… and all employees who are not assigned to syrup and/or desugarization campaign shall be considered as working on the inter-campaign schedule"* is also clear and unambiguous. It is clear that employees, both year-round and campaign that are not working in the extra campaign, are considered working in the inter-campaign schedule.[7] The parties have consistently applied this clear and unambiguous interpretation of the language at both the East Grand Forks and Hillsboro facilities since their respective MDS facilities came on line.

The Union argues that the literal interpretation of this Article requires that the Employer either employ all campaign employees ("all in") who were working in positions being carried over (established by the Employer in the pre-extract campaign meeting with the Union) or none of the campaign employees ("all out"). I see no merit in the

[7] Campaign employees are normally laid off at the end of the beet campaign, however, testimony at the hearing indicated that if there were not enough year-around employees to fill all the inter-campaign positions, campaign employees would be retained by seniority during the inter-campaign season.

Union's argument based upon the literal language in the Article. Rather, the literal language of the Article indicates that the Employer has the right to "assign" employees (both year-round and campaign) to the extract campaign. The language states, "*… and all employees who are not assigned to syrup and/or desugarization campaign …"* [Emphasis added]. The literal language speaks to the assignment of employees for the extract campaign; and absent contractual restrictions to Article 1.7 of the Management Rights clause, which states, *"The Company shall have full power and authority to determine all matters in connection with plant operations,…",* the Employer has the broad managerial right to select positions to be utilized in the operation of its facilities and thereby assign employees to fill said positions.[8]

There is no language in Article 2.3 or in the Agreement restricting the Employer's Article 1.7 rights in assigning employees to extract positions. There is also no language in the Agreement that prevents the Employer from determining the number of positions it would use during the extract campaign including the number of campaign employees needed for the extract campaign. In fact, the Employer, prior to every extract campaign since 1994, meets with the Union and presents the "assignment" of positions for the extract campaign. There is also no language in Article 2.3 or in the Agreement requiring the Employer to assign either "all" or "none" of the beet campaign employees who had jobs directly related to the extract campaign. It is axiomatic that if the parties had intended such a course of action, they would surely have incorporated said language, as the Employer argues, into the Article.

[8] The only restriction on the assignment of any employee would be the seniority provisions of the Agreement. In this regard, there is no evidence that the Employer violated the seniority provisions of the Agreement and none were alleged in the grievance.

Based on the clear and unambiguous language of Article 2.3, the Employer did not violate its provisions when it laid off certain campaign employees whose jobs were directly related to the extract campaign in April 2006. Not with standing the clear and unambiguous language of Article 2.3, the Union argues that past practice dictates the "all in or all out" practice of the Employer when employing campaign workers during the extract campaign.

Even assuming arguendo that the language in Article 2.3 is not clear and ambiguous, the Union failed in its burden to establish that the parties have a past practice history of retaining all campaign workers or none during the extract campaign. The Union failed to establish that the parties agreed to the "all in or all out" procedure during the 1990 negotiations or any other subsequent negotiations. Rather, the evidence proffered by the Employer through former International Union 1990 negotiations Recording Secretary Kjos and Hillsboro Plant Manager Kennedy shows that no such agreement or understanding ever existed. Further, the evidence established that the East Grand Forks MDS facility, which is subject to the same Agreement as Hillsboro, utilized less and less campaign workers after that facility became operative in 1993 and no campaign workers after 2000. In addition, there is no evidence of a mutuality of agreement between the parties of such a practice, an element essential in finding both parties intended an "all in or all out" practice or procedure.

In conclusion, the Union failed in its burden to establish that the Employer violated the provisions of Article 2. 3, or for that matter "past practice" when it retained less than

a full compliment of campaign workers at the Hillsboro facility in the Spring of 2006 and used year-around employees to fill certain positions in the extract campaign.

Therefore, I conclude that the grievance is without merit, and it is denied in its entirety.

VII. AWARD

The grievance hereby is denied in its entirety.

Dated: June 2, 2007

In Eagan, Minnesota

Richard R. Anderson, Arbitrator